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No. 91-794

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In The

Supreme Court of the United States

October Term, 1991

HENRY HARPER, *et al.*,

Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of Virginia decided a federal question when it determined that *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), should not be applied retroactively. As an alternative holding, the Virginia Supreme Court decided as a matter of state law that the state tax refund remedy sought by these Petitioners was unavailable. Petitioners do not argue that this alternative state law holding was in any way inconsistent with, or should have been overridden by, principles of federal law. The question for decision at this stage of the case, therefore, is whether the state law basis for the judgment below presents an adequate and independent state law ground that, under accepted principles, precludes the exercise of jurisdiction by this Court to review the federal question presented by the Petition for Certiorari.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

1. The Retroactivity Question 5
2. Equitable Considerations 6
3. The Adequate and Independent State Ground 11
4. The Adequacy and Independence of the State Ground 15
5. Procedural Posture of the Case 21
6. The Relevance of *Beam* 25
7. The Military Retirees 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

American Trucking Ass'ns v. Smith, 110 S.Ct. 2323 (1990) 6

Arnett v. Kennedy, 416 U.S. 134 (1974) 23

Barker v. Kansas, 249 Kan. 186, 815 P.2d 46, *cert. granted*, 60 U.S.L.W. 3402 (U.S. Dec. 3, 1991) (No. 91-611) 27

Brown v. Board of Education, 347 U.S. 483 (1954) 10

Capehart v. City of Chesapeake, No. 5459 (Circuit Court, City of Chesapeake, decided October 16, 1974), *petition for writ of error denied*, 215 Va. xlvii, *cert. denied*, 423 U.S. 875 (1975) 12, 14, 17

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ..... *passim*

Coleman v. Thompson, 111 S.Ct. 2546 (1991) 14

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) ..... *passim*

Fountain v. Fountain, 214 Va. 347, 200 S.E.2d 513 (1973), *cert. denied*, 416 U.S. 939 (1974) 12

Goldberg v. Kelly, 397 U.S. 254 (1970) 23

James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991) ..... *passim*

Mathews v. Eldridge, 424 U.S. 319 (1976) 13, 14, 16

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 110 S.Ct. 2238 (1990) ..... *passim*

Michigan v. Long, 463 U.S. 1032 (1983) 13, 14, 16

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 10

TABLE OF AUTHORITIES – Continued

Page

Perkins v. Albemarle County, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing*, 214 Va. 416, 200 S.E.2d 566 (1973) 12, 14, 17

Quick v. Harris, 241 Va. 632, 202 S.E.2d 869 (1974), *cert. denied*, 420 U.S. 907 (1975) 12

Sutherland v. Swannanoa Corp., 189 Va. 149, 52 S.E.2d 92 (1949) 13

Swanson v. Powers, 937 F.2d 965 (4th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3344 (U.S. Oct. 21, 1991) (No. 91-666) 18, 20

STATUTES AND REGULATIONS

Va. Code Ann. § 58.1-1821 (1991) 22, 23

Va. Code Ann. § 58.1-1822 (1991) 22

Va. Code Ann. § 58.1-1825 (1991) 14

Va. Code Ann. § 58.1-1826 (1991) ..... *passim*

Va. Tax Reg. § 630-1-1820 23

Va. Tax Reg. § 630-1-1821 23

MISCELLANEOUS

Ch. 325, 1942 Va. Acts 481 (Reg. Sess.) 3

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The question in this case is whether the Commonwealth of Virginia is obligated under state or federal law to repay to the Petitioners and other similarly situated claimants tax refunds in excess of $440 million. The federal component of the Petitioners' claim is based on *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) (*"Davis"*).

Petitioners are retired federal employees who receive federal pension benefits and former members of active military service who receive military pay. More than 192,000 federal and military retirees live in Virginia – no other state has as many.

In May of 1989, these Petitioners filed suits in state court against the Virginia Department of Taxation (hereafter "Commonwealth"), seeking refunds for state income taxes paid for the taxable years 1985, 1986, 1987 and 1988. The suits were filed under Va. Code Ann. § 58.1-1826 (1991), which provides that "[i]f the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order [refunds]." The Petitioners' claim was that *Davis* applied retroactively to the state taxes collected in the years in question, and that the taxes were "erroneously and improperly assessed" under this provision of state law. Analytically, therefore, the case presented a situation where a state remedy was being sought to enforce a federal right.

The state trial court on cross motions for summary judgment on the issue of liability denied Petitioners relief and the Supreme Court of Virginia affirmed.[1] In an opinion published at 241 Va. 232, 401 S.E.2d 868 (1991), the Virginia Supreme Court held two things, as we elaborate below: (1) that no federal right had been established; and (2) that in any event the state remedy was not available on the facts presented.

The Petitioners sought certiorari in this Court from the Virginia Supreme Court's original decision on the ground, among others, that the Virginia Supreme Court was in error in applying the principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*"Chevron"*), to determine whether *Davis* should be given retroactive application. At the time that petition was filed, argument had been heard

[1] Because summary judgment was granted to the Commonwealth, no evidence has been taken on the proper calculation of any refunds.

and decision was pending in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) (*"Beam"*), which presented an analogous issue. This Court followed its normal practice of withholding action on the Petition for Certiorari in this case until *Beam* was decided. Again it followed its normal practice after the decision in *Beam*, by granting certiorari, vacating the Virginia Supreme Court decision, and remanding for further consideration in light of *Beam*.

The Supreme Court of Virginia has now reconsidered its former decision, found that the holding in *Beam* did not require a different result, and reaffirmed its former decision "in all respects." Petition for Certiorari, App. A. at 5a. It therefore reconsidered and reaffirmed its position that: (1) no federal right had been established; and (2) in any event the state remedy sought by the Petitioners was not available on the facts presented. The Petitioners seek certiorari from that reconsideration.

The state tax challenged in this case was originally adopted in 1942. *See* Ch. 325, 1942 Va. Acts 481, 500 (Reg. Sess.). It was not challenged or protested by any taxpayer for nearly 50 years. After this Court's March 28, 1989, decision in *Davis*, these Petitioners "discovered" that it had been clear for all of these 50 years that the tax was unconstitutional and should never have been assessed or collected.

Whatever the merits of that position, it is at least clear that such taxes could not be imposed *after* March 28, 1989. None have been. The Virginia General Assembly met in special session shortly after *Davis* was decided, repealed the tax under litigation in this case, and substituted a system of taxation for pensioners' income that is indisputably acceptable under *Davis* standards. Neither

these Petitioners nor any other taxpayers have suggested that the new tax suffers from any constitutional infirmity.

It is important at the outset to set forth the analytical structure of the issues presented in the Petition for Certiorari. Three quite separate steps are required before the Petitioners can prevail on the merits.

First, they must establish that assessment and collection of the pre-*Davis* taxes violated a federal right. This question turns on several issues of federal law, but fundamentally involves whether *Davis* is to be applied retroactively to the taxes at issue here, all of which were based on taxable events that occurred prior to the *Davis* decision.

Second, if they can establish that a federal right was violated, they must then establish that the particular state remedy on which they have based their suit supports the relief they seek. The cause of action asserted by the Petitioners here is based on state, not federal, law. It is based on one particular state claim, not others that might have been asserted. The questions of state law posed by their reliance on the particular state claim they have asserted are for the Supreme Court of Virginia to resolve. Those questions have been resolved by the Virginia Supreme Court against the Petitioners in this case.

Third, since the questions of state law have been resolved against them by the Virginia Supreme Court, the Petitioners can prevail in this Court only by advancing reasons founded on federal law that would displace the state-law conclusions on which the judgment below rests. As we will elaborate, they have not sought to do so. Nor could they do so. It follows that the Petition for Certiorari should be denied. Under the rationale of the opinion below, and given the federal questions the Petitioners

have raised in this Court, any resolution by this Court of the issues of federal law raised by the Petitioners will have no impact on the outcome of this lawsuit. When a case is in this posture, it is traditional for this Court not to reach out to resolve federal issues that may be of importance to some other case, but cannot be for this one.

REASONS FOR DENYING THE WRIT

1. The Retroactivity Question.

The federal issues presented by this case turn at the outset on application of this Court's decision in *Beam*. *Beam* held that decisions of this Court cannot be selectively prospective, that is, cannot be applied to the parties before the Court but not to others whose claims are based on facts that arose before the decision. That is all that *Beam* held. *Beam* was by its own terms a "narrow" decision:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

111 S. Ct. at 2448.

Disposition of the federal questions that arise in this case, and specifically whether this Court's decision in *Davis* can be the source of the federal rights asserted, necessarily involves the resolution of a number of issues left open in *Beam*. The first is whether *Davis* is, as a choice-of-law matter, a candidate for "pure" prospectivity. The Virginia Supreme Court held, in effect, that it

was. In its first decision in this case, the Virginia Supreme Court applied the *Chevron* factors and concluded that *Davis* should not be applied to tax years that had ended before the *Davis* decision. Petition for Certiorari, App. C at 14a. After this Court's remand order, the Virginia Supreme Court again considered this issue. It held that *Davis* itself did not resolve the question whether the ruling in that case applied to the parties before the Court and that it followed (applying the reasoning of *Beam*) that the issue of prospective or retroactive application of *Davis* was still open. Given this premise, the Virginia Supreme Court decided that its former resolution was still a correct and viable option, and adhered to this aspect of its former judgment.

It may be that this basic question – whether a *Chevron* analysis may be applied to resolve the choice-of-law issue presented by *Davis* – presents an issue of sufficient generality and importance to warrant the grant of certiorari in an appropriate case. But this is not that case, for reasons fully recognized in the Petition for Certiorari itself.

2. Equitable Considerations.

Petitioners embrace "the position taken by Justice Stevens in his dissent in *American Trucking Associations v. Smith*, 110 S. Ct. at 2350, *i.e.*, that courts enjoy latitude in fashioning equitable remedies. . . . " Petition for Certiorari at 9. They agree that "*Chevron* analysis would be relevant . . . to determining, within constitutionally permissible bounds, an appropriate remedy." *Id.* It is this point, and this concession, that ultimately makes this case an inappropriate vehicle for resolution of the retroactivity-of-*Davis* issue that Petitioners seek to raise.

There are a number of equitable considerations that are an appropriate part of the remedial issues raised by this case. The ultimate question to be faced is who should bear the cost of not having foreseen the invalidating decision in *Davis*. There can, of course, be no debate that *Davis* was not in fact foreseen. We know that it was not foreseen by these Petitioners, because they and many like them paid the taxes in question without protest for almost 50 years. Hundreds of thousands of taxpayers had paid this tax in Virginia from its enactment in 1942 until the *Davis* litigation (as had taxpayers over approximately the same period of time in 22 other states), without any suggestion that there might be a constitutional problem or any other legal difficulty with its imposition. As to the Virginia taxing officials, the Virginia Supreme Court correctly observed in its first opinion below that there is nothing in the facts or background of this case to suggest "that the Commonwealth acted other than in good faith reliance upon a presumptively valid taxing statute." Petition for Certiorari, App. C at 10a. One can search the litigated cases, the applicable administrative proceedings, and the relevant literature in vain for any warning or prediction that either the tax-paying or the tax-imposing communities anticipated the *Davis* result before it was announced. The simple fact is that no one – neither the Petitioners nor the Commonwealth nor their counterparts in 22 other states – recognized the constitutional infirmity in this particular Virginia tax prior to its articulation in the *Davis* decision. If a constitutional harm was occurring during this period of time, no one knew it or perceived injury from it.

As the Commonwealth argued below and as the Virginia Supreme Court held, there can be no doubt about

where the equities lie in this case. The Petitioners seek a windfall, the repayment of taxes which they thought to be lawful when paid and which have long since been budgeted and spent for state services, the benefits of which these Petitioners – like the other citizens of the Commonwealth – have fully enjoyed. They seek to shift the cost of those services, after the fact, to other taxpayers, taxpayers who are entirely innocent in this controversy and who – unlike them – have not slept on their rights for 50 years. A judgment in favor of the Petitioners will be paid by other taxpayers either through an increase in taxes or a reduction in services. In either event, there will be proportionally less money for the state's public school system, for law enforcement and corrections, for social programs, and for a wide variety of other state services. At the margins, those who will suffer the most will be those who are least able to provide fully for their own needs. What the Petitioners seek is the redistribution of $440 million from the other citizens of the Commonwealth to themselves and other similarly situated taxpayers as compensation for an abstract injury of which they were not even aware when it occurred.

And the "constitutional harm" which they have suffered is indeed abstract. One appropriate factor to aid the resolution of where the equities lie in a case of unforeseen constitutional developments is the nature of the harm suffered by the individual. These taxpayer-Petitioners were not harmed as the result of the denial of a personal constitutional right found in the Bill of Rights or the Fourteenth Amendment. No one broke into their homes; no one denied their freedom to speak or to worship; no one denied their right to a fair adjudication of criminal

charges. They were "harmed" because the Commonwealth of Virginia and 22 other states innocently failed to anticipate the correct interpretation of a principle of intergovernmental tax immunity that is designed to order the relationship between federal and state government, not – as in the case of the other rights mentioned above – the relationship between government and the individual citizen. We do not mean to suggest, of course, that these Petitioners do not have "standing" in the constitutional sense to complain about the violation of a prophylactic principle designed to order the relationship between two sovereigns, but we do suggest that their role in advancing their own interests in the name of protecting that relationship can adequately be served without conferring upon them a windfall profit at the expense of the remainder of the Commonwealth's tax-paying community. Put another way, prospective relief – freedom from future imposition of the taxes, already accomplished here by repeal of the offending tax – ought to be regarded as both an adequate incentive to bring such suits in the future (and thus insure protection of the principle of intergovernmental immunity) and an adequate remedy for uncovering the violation of the constitutional right. It is the interests of the United States that are really at stake here, and those interests are not advanced – indeed, they are undermined – by inhibiting the ability of the States to meet the basic needs of their citizens by such massive transfers of money (potentially billions of dollars nationwide) from the hands of the many to the hands of a few.

It is also important to examine the "constitutional harm" suffered by these Petitioners from another perspective. It is not our tradition that "constitutional harms" are always remedied by compensatory relief. Two

examples come readily to mind. In the school litigation inaugurated by *Brown v. Board of Education*, 347 U.S. 483 (1954), there was never any suggestion of retrospective compensatory relief to all of the school children who suffered the constitutional injuries remedied by that decision. The same was true, albeit in a dramatically different context, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the result of which was that the declaration that the Bankruptcy Act of 1978 was unconstitutional was given only prospective effect.

A third example is provided by this very case. No one is suggesting, in this litigation or in any of the litigation based on the *Davis* decision, that relief should be fully retroactive past the point where, for example, a state statute of limitations would preclude a refund remedy. There thus will not be "full" retroactive compensatory relief under any view of the present litigation. There is an important insight underlying this observation: the fact that it is recognized that *some* doctrinal formulations of state law (a statute of limitations, for example) can serve to cut off an asserted right to compensatory relief for the past "constitutional harm" involved in this case suggests that other doctrinal formulations in which the state seeks to close the book on prior transactions for similar and equally valid reasons should be given the same effect.

This is precisely what has happened in this case – that is, the Virginia Supreme Court has adopted a doctrinal formulation of state law that effectively recognizes repose interests similar to those typically formulated in a statute of limitations, and that forecloses relief to the Petitioners in this case *even if* imposition and collection of the tax in question violated the Constitution for the years

involved in this suit. It is to the development of this point that we now turn.

3. The Adequate and Independent State Ground.

The Virginia Supreme Court reached this result in Part II of its original opinion, affirmed on remand. Part I applied the *Chevron* factors and held that *Davis* was not to be applied retroactively. The Petitioners had argued that they were nonetheless entitled to relief under state law irrespective of the outcome of their federal claim. The Virginia Supreme Court first rejected that argument, holding that "because the *Davis* decision is not to be applied retroactively, the pre-*Davis* assessments were neither erroneous nor improper within the meaning of Code § 58.1-1826."[2] Petition for Certiorari, App. C at 15a. Beyond that, the Court continued:

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[2] Section 58.1-1826 provides in full as follows:

If the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order that the assessment be corrected. If the assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the court shall order that the applicant pay the proper taxes and to this end the court shall be clothed with all the powers and duties of the authority which made the assessment complained of as of the time when such assessment was made and all the powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard. The court may order that any amount which has been improperly collected be refunded to such applicant. A

(Continued on following page)

> Harper's state-law contention also fails for another reason. We previously have held that this Court's ruling declaring a taxing scheme unconstitutional is to be applied prospectively only. *Perkins v. Albemarle County*, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing*, 214 Va. 416, 200 S.E.2d 566 (1973). We adhere to our holding in *Perkins*. In so doing, we follow the criteria stated in *Fountain v. Fountain*, 214 Va. 347, 348, 200 S.E.2d 513, 514 (1973), *cert. denied*, 416 U.S. 939 (1974), that "consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule." *See also Quick v. Harris*, 241 Va. 632, 202 S.E.2d 869, 871 (1974), *cert. denied*, 420 U.S. 907 (1975).

Petition for Certiorari, App. C at 15a-16a. In a footnote omitted from the above passage, the Court added:

> The case of *Capehart v. City of Chesapeake*, No. 5459 (Circuit Court, City of Chesapeake, decided October 16, 1974), followed *Perkins*. In *Capehart*, more than one hundred taxpayers in the City of Chesapeake, who had been subjected to the same practice that was invalidated in *Perkins*, brought suit in circuit court seeking, among other things, refunds of the taxes "illegally and unconstitutionally assessed." The City demurred, citing *Perkins*. The circuit court sustained the demurrer, being of opinion that the case was controlled by *Perkins*. We denied

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copy of any order made under this section or § 58.1-1827 correcting an erroneous or improper assessment shall be certified by the clerk of the court to the Tax Commissioner.

> Capehart's petition for appeal,[3] 215 Va. xlvii, and Capehart's petition for certiorari raising due process grounds was denied by the Supreme Court. 423 U.S. 875 (1975).

Petition for Certiorari, App. C at 16a n. 3. Finally, in its summation of its holding in Part IV of its original opinion in this case, the Virginia Supreme Court said:

> In sum, we hold that, (1) under the *Chevron* test, the *Davis* decision is not to be applied retroactively, [and] (2) state law does not require tax refunds, but to the contrary, grants prospective-only application to decisions that invalidate a taxing scheme. . . .

Petition for Certiorari, App. C at 17a.[4]

Several things need to be said about these passages. First, it is clear that the Virginia Supreme Court is relying solely on state law in the conclusions stated. This is not a case where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). There is thus no need for the "plain statement" of exclusive reliance on state law grounds contemplated by

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[3] This denial of the petition for appeal by the Virginia Supreme Court was a decision on the merits. *Sutherland v. Swannanoa Corp.*, 189 Va. 149, 154, 52 S.E.2d 92, 95 (1949).

[4] The Virginia Supreme Court reaffirmed these portions of its first opinion in the opinion from which this writ of certiorari is sought. The last line of its second opinion states that "we reaffirm our prior decision in all respects." Petition for Certiorari, App. A at 5a. And the two preceding paragraphs, as elaborated below, can only be read as referring to the "state-law ground" portions of its first opinion.

Michigan v. Long to resolve ambiguous references to federal law in state court opinions. *See Coleman v. Thompson*, 111 S.Ct. 2546, 2558-59 (1991). There is no ambiguity here about the state-law grounds on which the state court relied in this part of its original opinion.

Second, what the Virginia Supreme Court is saying – and note that the cases on which it relies were decided long before the tax years at issue here – is that the remedy sought by these Petitioners under Va. Code § 58.1-1826 can be asserted only for assessments that were "erroneous and improper" under established law at the time of the assessment. What *Perkins* and *Capehart* mean is that the state law remedy under § 58.1-1826 is unavailable in a case like the present one, irrespective of the fact that the Federal Constitution may have been violated at the time the assessment was made. As has been pointed out above, the same could be said of a suit brought today for a refund of a tax "unconstitutionally" imposed and collected from a retired federal employee in 1942. In that case, the analysis presumably would be that the statute of limitations policy expressed in Va. Code § 58.1-1825 (three years) would stand as a legitimate state-law procedural barrier to compensatory relief for the violation of federal law. What we have here is really the same thing. The Virginia Supreme Court has enforced a limitation on the remedy sought by these Petitioners that has been recognized in state law since 1973. It, just as would a statute of limitations, forecloses compensatory relief for previously paid taxes that are invalidated by the recognition of a new principle of law. Both principles of state law are grounded in policies of respose that recognize legitimate state interests in fiscal stability and planning. Neither is it unfair to people in the Petitioners' shoes, it

should be added, because in both cases – the case of a statute-of-limitations foreclosure and the case of an unavailable remedy under Va. Code § 58.1-1826 – alternative remedies were available at an earlier day under which they could have protected their rights.

Third, it is of course within the competence of this Court to examine principles of state law such as these in order to determine their acceptability under appropriate federal standards. We will have more to say about this point immediately below. But what by longstanding tradition is *not* within the competence of this Court is to challenge state courts on their determination of the meaning and application of state law. It is for the Virginia Supreme Court to say what state law is, and that Court has done so in this case. That premise can be challenged on federal grounds, and we now turn to how that challenge plays out in the present case.

4. The Adequacy and Independence of the State Ground.

This case turns, in the language of this Court's adequate and independent state ground doctrine, on whether principles of federal law have been evaded or undermined by the application of state law in the courts below. Within the framework of accepted doctrine, the question is whether the state law ground that supports the judgment below is either "inadequate" to foreclose reaching the federal questions or "not independent" of appropriate federal principles.

There can be no argument here that the conclusions of state law on which the decision below rests are "not independent" of federal law. No federal cases are cited in

this portion of the state court opinion, no federal law discussed. As noted above, there is no ambiguity here of the sort that concerned the Court in *Michigan v. Long*.

Substantial questions could be raised, perhaps, about the "adequacy" of the state ground advanced in the court below. It could be argued, for example, that due process requires the states to afford a backward looking remedy in at least some cases of unconstitutional taxation. This Court held as much in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990) (*"McKesson"*). Respondent has no quarrel with *McKesson*, nor with the principles that underlie it. But that case is dramatically different from the situation here.

McKesson establishes that prospective relief alone is not adequate in a case where it was entirely foreseeable at the time of enactment of a challenged state tax statute that the tax in question would be contested and invalidated. *McKesson* addressed the state interest in sound fiscal planning in the following passage:

> [W]e do not find this concern weighty *in these circumstances*. A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitation applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an

> escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

110 S. Ct. at 2254-55 (emphasis added). The Court observed that "in the present case, Florida's failure to avail itself of certain of these methods of self-protection weakens any 'equitable' justification for avoiding its constitutional obligation to provide relief" and added that, in any event, Florida had ample notice that the statute in litigation in *McKesson* was potentially defective when measured against constitutional standards. *Id.* at 2255. From this it followed that Florida's " 'equitable' justification" for withholding relief was without basis.

The point to be made here is that Virginia has availed itself of certain of these methods of "self-protection." It adopted the limitation on its state refund statute reflected in *Perkins* and *Capehart* in 1973, long before the instant litigation was filed. Petitioners were on notice at the time they paid the taxes to which they now object that refunds would not be available under Va. Code § 58.1-1826 based upon subsequent legal developments.

And it does not follow from the reasoning of *McKesson*, moreover, that the ability of the states to engage in sound fiscal planning is an illegitimate consideration in *all* cases where state taxes have been found to violate federal law. Florida's ability "in the future" to invoke procedural protections of the sort suggested by the Court in *McKesson* sufficed to secure its interest in sound fiscal planning in that case because it was clearly

on notice that the tax in question was of doubtful legality when that tax was adopted.[5] Florida, in other words, could have adequately protected its fiscal interests by paying more attention to this Court's constitutional precedents. The same point could not in fairness be made in a case where both the State and the taxpayer have had no reason to question the legality of a tax for 30 or 40 or 50 years. In such a case, it is submitted, federal due process would not be violated by a restriction of relief to prospective invalidation of the tax.

There should be room in the applicable principles of federal due process, in other words, for consideration of the reliance interests of state governments based upon reasonable assumptions about the stability of law over time. A related issue recently arose in *Swanson v. Powers*, 937 F.2d 965 (4th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3344 (U.S. Oct. 21, 1991) (No. 91-666). The plaintiffs in that case sued the former North Carolina Secretary of Revenue for $140 million for her actions in collecting

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[5] The Court was explicit about this rationale in *McKesson*, 110 S. Ct. at 2257, when it gave two reasons for the conclusion that "the State's interest in financial stability does not justify a refusal to provide relief." The first was that "the State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise. . . . " The second was that Florida could take procedural steps in the future "against any disruptive effects of a tax scheme's invalidation."

The situation now before the court is importantly different. The decision calling the Virginia tax statute into question was a surprise. And steps that Virginia – and other states now facing huge tax refund claims – can take "in the future" are of little value to mitigate the disruption and financial instability now faced based on events that have already occurred. Legitimate steps they have taken to protect these interests in the past, moreover, should be respected.

North Carolina's version of the same tax at issue in *Davis*. The suit was brought in federal court under 42 U.S.C. § 1983 and was appealed to the Fourth Circuit on the question whether the former North Carolina Secretary of Revenue was entitled to qualified immunity. Judge J. Harvie Wilkinson, writing for the court, held she was: "We believe that to hold Secretary Powers liable because she failed to accurately predict the outcome of the *Davis* decision would work a miscarriage of justice. . . . " 937 F.2d at 967. The court went on to say:

> Only violations of those federal rights "clearly recognized in existing case law" will support an award in damages under 42 U.S.C. § 1983. Public officials must be able to discharge their public duties free of an omnipresent fear of § 1983 liability. Only in that way can we be sure that government can continue to function efficiently while liability will fall properly upon only "the plainly incompetent or those who knowingly violate the law."
>
> This tolerance for a range of reasonable public actions is particularly important for those who must interpret often imprecise or incomplete legal precedent. . . .
>
> In interpreting qualified immunity, then, we must appreciate the fact that the direction of the law may be difficult to ascertain. Thus, although public officials may be "charged with knowledge of constitutional developments, [they] are not required to predict the future course of constitutional law." . . . The requirement, after all, is that the law be clearly established, not simply possibly established or even probably established. Since qualified immunity is appropriate if reasonable officers could disagree on the relevant issue, it surely must be appropriate when reasonable jurists can do so.

937 F.2d at 967-68 (citations omitted). The plaintiffs argued in *Swanson*, as the Petitioners argue here, that nothing "new" was established in *Davis*. Judge Wilkinson responded:

> We disagree. Secretary Powers was enforcing a long-standing statute that was similar to enactments elsewhere. The most pertinent judicial decisions had upheld comparable taxing schemes and the doctrine of intergovernmental tax immunity was, at best, ambiguous. We decline to proclaim in hindsight after the *Davis* decision, that the unconstitutionality of differential tax exemptions had been clear all along.

937 F.2d at 968.

One of the premises of the judicial doctrine of qualified immunity under § 1983 is that it is unfair to hold public officials accountable for unforeseeable developments in constitutional law. The doctrine builds an element of fault into the principles that determine the accountability of public officials for the constitutional harms they inflict. What the Virginia Supreme Court has done in its decision below, and in the body of state law precedent dating from 1973 on which the decision below is grounded, is essentially the same thing. It has built an element of fault into the refund remedy provided by Va. Code § 58.1-1826. It puts upon taxpayers the burden of raising "new" constitutional arguments before they pay the tax, by limiting refund actions to cases where the basis for the refund was reasonably predictable based on established law. It is no less unfair to the citizens of Virginia to require them to pay $440 million to these Petitioners and other similarly situated taxpayers than it would have been to require Secretary Powers to pay comparable taxpayers in North Carolina. Both situations

call, in Judge Wilkinson's words, for "tolerance for a range of reasonable public actions." 937 F.2d at 968. The Virginia Supreme Court built that tolerance into its state-law remedial structure.

5. Procedural Posture of the Case.

The state-law ground advocated by the Virginia Supreme Court in support of its judgment below is fully adequate under appropriate federal standards. It follows from the normal application of accepted principles that this Court should not reach the merits of the federal question presented. For this reason alone, the writ of certiorari should be denied.

The Petition for Certiorari has chosen to ignore the state-law basis for the decision below. Petitioners have not argued that the state ground on which the decision rests is either "inadequate" or not "independent." But there is yet another reason why the writ should be denied.

While Petitioners seem to argue in this Petition that the failure of the State to supply a retrospective refund remedy would be a violation of due process, this is not the stage of this litigation where such questions should be entertained by this Court. No such questions were passed upon by the Virginia Supreme Court. Such questions can be addressed when they are properly presented in a case in which they have been properly litigated and decided in the lower courts.

Moreover, as the Commonwealth argued below, the "due process" issue now asserted by Petitioners is not a clean "remedy or no-remedy" question. Petitioners sought post-deprivation relief under Va. Code § 58.1-1826. They are not, as the Virginia Supreme Court held below, entitled to

that remedy. They were, however, entitled at another time on another day to another remedy. What they failed to do was pursue an avenue of predeprivation relief that was open to them under Virginia law.

We repeat here the argument we made below:

A. In Virginia, a taxpayer is entitled to challenge a tax assessment in a pre-deprivation (*i.e.*, prior to payment) procedure set forth in §§ 58.1-1821 and 58.1-1822. Section 58.1-1821 provides:

> Any person assessed with any tax administered by the Department of Taxation may, within ninety days from the date of such assessment, apply for relief to the Tax Commissioner. Such application shall be in the form prescribed by the Department, and shall fully set forth the grounds upon which the taxpayer relies and all facts relevant to the taxpayer's contention. The Tax Commissioner may also require such additional information, testimony or documentary evidence as he deems necessary to a fair determination of the application.
>
> On receipt of a notice of intent to file under this section, the Tax Commissioner shall refrain from collecting the tax until the time for filing hereunder has expired, unless he determines that collection is in jeopardy.

Section 58.1-1822 provides:

> If the Tax Commissioner is satisfied, by evidence submitted to him or otherwise, that an applicant is erroneously or improperly assessed with any tax administered by the Department of Taxation, the Tax Commissioner may order that such assessment be corrected. If the assessment exceeds the

> proper amount, the Tax Commissioner shall order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid into the state treasury, and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the Tax Commissioner shall order that the applicant pay the proper taxes. He shall refund to the taxpayer any exempt funds which have been improperly collected. The Tax Commissioner shall refrain from collecting a contested assessment until he has made a final determination under this section unless he determines that collection is in jeopardy.

B. Virginia Regulation § 630-1-1820 provides that § 58.1-1821 "may be used to protest any and all issues connected with an assessment." While § 58.1-1821 does not require a formal hearing, a taxpayer may present his position both in writing and in person. Va. Reg. § 630-1-1821 (Application under § 58.1-1821 "will be handled within the Department [of Taxation] in the manner best determined by the Commissioner to resolve the dispute, which may include submission of additional documents and memoranda, further audit, holding a conference with the taxpayer or the taking of testimony."). Under precedent established by this Court, this procedure satisfies the demands of due process for a pre-deprivation administrative proceeding. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

C. Applying this analysis to the facts presented here, it is clear that Virginia's administrative predeprivation remedy satisfies due process. Section 58.1-1821 allows the taxpayer to

set forth the grounds for contesting the tax, provides for the presentation of any evidence necessary to a fair determination of the action, and permits the exoneration from payments of any amount erroneously or improperly charged. Unless collection is in jeopardy, the Tax Commissioner must refrain from collecting a contested assessment under the statute.

D. Plaintiffs had a clear, meaningful, predeprivation opportunity to challenge the validity of the tax provisions relating to pensions. They chose not to do so and, under *McKesson*, must be considered to have paid the challenged taxes voluntarily. Under the rule of *McKesson*, due process does not now require additional post-deprivation procedure with backward looking relief.

We do not restate these arguments here in the view that this Court should now resolve the questions of state and federal law which they raise. But they do reinforce the wisdom of this Court's practice that it will not consider issues that have not been fully ventilated below. There are complex questions of state law intertwined in any resolution of whether denial of a remedy under § 58.1-1826 is a violation of federal due process. But the procedural posture of the present case makes it unnecessary for this Court to reach those issues now. The Petitioners did not challenge the adequacy of the predeprivation remedy in the Virginia Supreme Court, and accordingly, the questions of state law on which any resolution of the federal due process issue would turn were not presented by the Petitioners in the proceedings below.

6. The Relevance of *Beam*.

Finally, the arguments made here must be considered in light of the premises and structure of *Beam*. The Virginia Supreme Court has thoughtfully and carefully considered this Court's pronouncements in *Beam*, and its decision on remand is fully consistent with the requirements of that case.

The question in *Beam* was at what analytical points the retrospectivity of a Supreme Court decision could be considered. *Beam* divided the relevant landscape into two kinds of issues, choice-of-law questions and remedy questions. 111 S. Ct. at 2443.

The choice-of-law issue involved the operative substantive principles that would determine the federal rights sought to be asserted. There were three options: complete retroactivity, complete prospectivity, and selective prospectivity. What *Beam* did was eliminate the third option. 111 S. Ct. at 2446. Supreme Court decisions are not going to be selectively prospective in the sense that they apply to the parties before the Court but not to others whose facts arose before the decision.

What *Beam* did not do is select between the other two options; complete prospectivity and complete retrospectivity are still possible outcomes after *Beam*. 111 S. Ct. at 2448. As this result would apply to the present case, this means that it remained open for the Virginia Supreme Court to hold, as it did, that *Davis* was to be applied in a purely prospective manner. That is the only federal question decided in the opinion below.

What is even more important to the ultimate issues in this case is another point – the question of available remedies – not resolved in *Beam*. As noted by the Justices of the Virginia Supreme Court (Petition for Certiorari,

App. A at 5a), Justice Souter's opinion stated at the end of part III that "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." 111 S. Ct. at 2448. He elaborated at the beginning of Part IV of his opinion:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds of pure prospectivity.
>
> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S., at 277. Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal.

111 S. Ct. at 2448.

Here, unlike *Beam*, remedial issues were considered below. The Virginia Supreme Court accepted the invitation in *Beam* to "consider[] . . . individual equities when deciding [the] remedial issues in [this] particular case[]." 111 S. Ct. at 2448. It did so by applying established precedent that had anticipated the issue, and that had

resolved the matter under Virginia law in 1973. Petition for Certiorari, App. C at 15a-16a. And in the last three paragraphs of its opinion, written in response to this Court's reconsideration order, the Virginia Supreme Court reinforced these conclusions from its first opinion by referring to precisely the above quoted passages in the *Beam* decision. Petition for Certiorari, App. A at 5a.

What the Virginia Court did was entirely consistent with *Beam*. And since the issues on which the decision below turns involve questions of state law that have not been challenged in the Petition for Certiorari, the Petition should be denied.

7. The Military Retirees.

The Petitioners make one other argument that requires a response, though it can be brief. They argue that the Commonwealth's effort to distinguish between civil service retirees and military retirees "presents an independent ground necessitating plenary review by the Court." Petition for Certiorari at 12. It is clear that certiorari should not be granted on this issue in this case. And the fact that this issue is even raised in the Petition suggests that a limited grant of the writ would be appropriate should the Court be inclined to hear the case on other issues.

The reason certiorari on this issue is inappropriate is straightforward. The Court has granted certiorari in a case which clearly presents this issue. *Barker v. Kansas*, 249 Kan. 186, 815 P.2d 46, *cert. granted*, 60 U.S.L.W. 3402 (U.S. Dec. 3, 1991) (No. 91-611). Moreover, the Court should not hold this case pending resolution of *Barker* because Petitioners did not raise this issue below, nor did the Virginia Supreme Court address the issue. It is true

that *the Commonwealth* argued in the trial court that there was a relevant difference between how the *Davis* decision should be applied to civil service retirees and how it should be applied to military retirees (if it is to apply at all to taxable events that concluded before the decision). But it is also true, as the Petitioners conceded in their previous Petition for Certiorari (Petition for Certiorari, No. 90-1685, p. 19), that "[t]he court below did not reach this argument. . . . " They did not acknowledge then, as they do not now, that *they* did not raise the argument they now wish to make in the trial court below, thus precluding review by the Supreme Court of Virginia. It is surely novel to assert that this Court should grant certiorari to reject an argument made by the prevailing party below, that was neither adverted to nor passed upon by the court below, that was in no sense necessary to the judgment below, that was in fact made unnecessary by the basis for the decision below, and that raises an issue never raised by the Petitioners until they reached this Court. Petitioners would give a new dimension to the "advisory opinion" concept if they were successful in obtaining a grant of the writ on this issue.

CONCLUSION

In the end, there is only one federal question presented by this Petition for Certiorari that is of sufficient importance as a general matter to warrant a grant of the writ. That question – whether *Davis* can be applied in a purely prospective fashion – may need to be resolved by this Court at some juncture. But traditional principles governing the jurisprudence of this court suggest that the Court should do so in a case where resolution of the

issues makes a difference to the outcome of the case. Principles that counsel against the rendering of advisory opinions also counsel against granting the writ in this case. This case involves an asserted federal right sought to be enforced through an unavailable state cause of action. The Petition for Certiorari suggests no ground upon which the unavailability of the state cause of action offends or is in any way inconsistent with federal interests. Were the Court to uphold the existence of the federal right as Petitioners ask, the case still would reach the same result because the Petitioners have not challenged the state ground that fully supports the decision below. The only effect of granting certiorari will be to require yet another decision by this Court, followed by yet another decision on remand by the Virginia Supreme Court, followed by yet another round of certiorari proceedings in this Court – all in a case where the ultimate outcome is already plain. It is time for these proceedings to come to an end.

Respectfully submitted,

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